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15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
17 SAN FRANCISCO DIVISION  
18

19 WAYMO LLC,  
20 Plaintiff,  
21 v.  
22 UBER TECHNOLOGIES, INC.,  
OTTOMOTTO LLC; OTTO TRUCKING LLC,  
23 Defendant.  
24

Case No. 3:17-cv-00939-WHA

**DEFENDANTS UBER  
TECHNOLOGIES, INC. AND  
OTTOMOTTO LLC'S  
CORRECTED OPPOSITION TO  
WAYMO'S MOTION FOR ORDER  
TO SHOW CAUSE WHY  
DEFENDANTS SHOULD NOT BE  
HELD IN CONTEMPT**

Date: July 26, 2017  
Time: 8:00 a.m.  
Ct rm: 8, 19th Floor  
Judge: The Honorable William Alsup

Trial Date: October 10, 2017

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## INTRODUCTION

Waymo LLC has not met its burden to show that sanctions are warranted. Waymo's motion is based on the premise that Uber Technologies, Inc. and Ottomotto LLC ("Otto") (collectively, "Uber") have possession of the "downloaded materials" (as defined in this Court's Orders) but have refused to return them. That premise is wrong. Uber does not possess or control the materials at issue and therefore cannot return them. It cannot be held in contempt for failing to do so.

Waymo has four arguments, each of which is based on inaccurate information or a mischaracterization of the facts.

First, Waymo claims Uber has failed to cause Stroz Friedberg LLC to return downloaded materials to Waymo. Waymo's argument seems to be that Uber knows that Stroz has the 14,000 files that Waymo claims Mr. Levandowski took from Google, that Uber has full power to tell Stroz what to do with those files, and that Uber has willfully refused to order Stroz to return those files. None of these points is correct. Uber has no knowledge of Stroz possessing the over 14,000 files that Waymo alleges Mr. Levandowski stole from Waymo. Moreover, as Waymo knows, Mr. Levandowski and Stroz entered into a contract that strictly prohibited Stroz from disclosing any Google-related information he may have provided to Stroz for its due diligence to any third parties, including Uber. That contract shows that Uber does not have the legal power to compel Stroz to provide Waymo with anything Mr. Levandowski gave Stroz. If Uber had that legal power, it would have exercised it. Uber sent a letter to Stroz making clear that it wants Stroz to provide any Google-related materials to Waymo. Uber also sent a letter to Mr. Levandowski telling him he must direct Stroz to do so if he wanted to have any hope of curing the deficiencies that led to his termination. Mr. Levandowski refused to provide that directive and was terminated, and Stroz did not produce the materials. Uber has taken all reasonable steps to have the downloaded materials returned to Waymo from Stroz and cannot be held in contempt for failing to do what it is legally foreclosed from doing.

Second, Waymo seeks to hold Uber in contempt for failing to cause its outside counsel, MoFo, to return downloaded materials to Waymo. But here again, Waymo's argument ignores

1 and distorts the facts. The Stroz Report and “downloaded materials” are not one and the same.  
2 Concerning whether it has access to any “downloaded materials,” MoFo explained that it does not  
3 “except to the extent that any such material may appear: (1) excerpted in or as an exhibit to the  
4 Stroz Report, which is privileged; and (2) in certain materials AL and other persons provided to  
5 Stroz to which MoFo was given limited access during the Stroz investigation pursuant to the  
6 terms of the AL-Stroz contract and the protocol governing the investigation, and under strict  
7 conditions preventing MoFo from sharing those materials with anyone, including Uber.”  
8 (Schmidt Decl. Ex. 7, Dkt. No. 676-15.) The materials referenced in category (1) were listed on a  
9 privilege log in a timely fashion and are the subject of a stay of production and pending litigation  
10 before the Federal Circuit. To the extent the privilege claim over those materials is ultimately  
11 rejected, those materials will be produced. Upon further investigation, MoFo has determined that  
12 the materials in category (2) are not in MoFo’s possession, except to the extent any were included  
13 as exhibits to the Stroz Report (and hence covered by the privilege dispute covering category (1)).  
14 Finally, Uber learned for the first time yesterday that further investigation by MoFo also has  
15 revealed that there is a third category of materials that MoFo discovered is still in its possession:  
16 i.e., certain materials that Levandowski provided to Stroz, and that Levandowski authorized Stroz  
17 to provide to MoFo in its previous role as personal counsel for Levandowski, as explained in the  
18 July 12, 2017 Declaration of Eric Tate (Dkt. 883). Uber has never had possession of those  
19 materials and does not control these materials. Especially because Uber did not know MoFo even  
20 had these materials until yesterday, Uber cannot be held in contempt for not producing materials  
21 it does not possess or control.

22 On both of the foregoing points, Waymo expresses incredulity that Uber could take the  
23 position that “stolen files” are Mr. Levandowski’s “personal property.” That mischaracterizes the  
24 facts and is not what we have ever said. First, Waymo incorrectly equates the broad definition of  
25 “downloaded materials” in the Court’s Orders with “stolen files.” They are not the same. In  
26 identifying materials for the privilege log and in answering questions about what MoFo may have  
27 had access to, both Uber and MoFo read the Court’s Orders to refer to any Google materials  
28 Mr. Levandowski downloaded before leaving Google and took with him upon leaving—whether

1 they were innocuous or otherwise, whether relating to trade secrets or not, whether taken  
2 inadvertently or not. The Court's Order also required disclosure of any other document that  
3 "referred" to such a downloaded file, which thereby triggered a large privilege log based on any  
4 due diligence email that may have discussed any Google material of any kind provided or  
5 referenced by Mr. Levandowski. Second, regardless of how the materials are described, Uber is  
6 not insisting that everything Mr. Levandowski gave to Stroz is his "personal property," simply  
7 that it is not *Uber's* property. The contract between Mr. Levandowski and Stroz does not give  
8 Uber possession, custody, or control over any Google materials Mr. Levandowski gave to Stroz,  
9 beyond the small number attached to the Stroz Report, all of which have been logged and are the  
10 subject of the privilege dispute.

11 Third, Waymo claims that Uber willfully failed to disclose Mr. Levandowski's destruction  
12 of five discs of Google material in March 2016, which Uber disclosed in its interrogatory  
13 response on June 5, 2017. Waymo says that Uber should be held in contempt for not disclosing  
14 this information on March 31, 2017 in response to this Court's Order dated March 16, 2017. That  
15 does not support a contempt finding in light of Uber's substantial efforts and good-faith  
16 undertaking to comply with that Order and lack of willfulness in making the late disclosure of the  
17 fact (which is helpful to Uber). Uber logged documents discussing the five discs and their  
18 destruction on its privilege log and then provided information about the five discs after realizing it  
19 could do so in a non-privileged form. Uber regrets not recognizing that it was possible to present  
20 non-privileged evidence about this destruction earlier, but that oversight is not a basis for  
21 contempt, particularly where Uber has never seen the discs or their contents and cannot verify  
22 their existence or whether they in fact contained downloaded materials. The June 5 disclosure  
23 does not change the fact that Uber expended enormous resources to comply with the March 16  
24 Order and substantially complied with that Order in good faith.

25 Fourth, Waymo claims that Otto Trucking LLC ("Trucking") has failed to exercise its  
26 power to cause Mr. Levandowski to return any downloaded materials. Trucking will presumably  
27 respond to this directly, but Uber notes that this argument is illogical: Mr. Levandowski is a  
28 member and the majority shareholder of Trucking, and controls what it can and cannot do.

Trucking does not have the power to force Mr. Levandowski to do anything that Mr. Levandowski does not agree to do.<sup>1</sup>

## BACKGROUND

### A. Uber Devoted Enormous Resources to Comply with the Court's March 16 Order.

Among other things, this Court's March 16 Order contained the following requirement:

By March 31, defendants shall produce for inspection all files and documents downloaded by Anthony Levandowski, Sameer Kshirsagar, or Radu Raduta before leaving plaintiff's payroll and thereafter taken by them. Defendants shall also produce for copying the card reader, thumb drive, or other media used for the downloads, as well as all subsequent emails, memoranda, PowerPoints, text messages, or notes that have forwarded, used, or referred to any part of said downloaded material. If any part of said downloaded material has been deleted, destroyed, or modified, then defendants shall state the extent thereof and produce all documents bearing on said deletion, destruction, or modification.

(Dkt. No. 61 at ¶ 4.) As it has stated since the beginning of this case, Uber did not and does not believe it ever received any of the 14,000 downloaded files that Waymo's complaint alleges were stolen by Mr. Levandowski. (*See, e.g.*, Uber's Answer to FAC, Dkt. No. 704, Preliminary Stmt. ¶ 14; Defendants' Response to the Court's Ten Questions, Dkt. No. 755 at 9-13.) Uber likewise did not and does not believe it had any "downloaded material" as described in this paragraph, which is a broader category than the 14,000 files. Nevertheless, in order to be certain that was the case, Uber undertook enormous efforts to search its electronic systems to confirm that none of the files or documents described in this Order were on its systems. In order to do so, Uber's vendor, Stroz Friedberg, forensically collected approximately 235 terabytes of data, including data from nine servers and 148 different custodians. (Corrected Ray Decl. ¶ 3.) The custodian collection

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<sup>1</sup> Waymo's illogical argument is the byproduct of its strategic decision not to name Levandowski as a defendant in this lawsuit. Waymo chose not to sue Mr. Levandowski for trade secret violations because it knows that would have triggered an arbitration of all such claims, and also would have demonstrated the real target of Waymo's claims—Mr. Levandowski, not Uber. Indeed, if Waymo truly wanted the full force of the federal courts to force the return of any stolen property, then Waymo should have sued the perpetrator (Levandowski), rather than asking this Court to hold other parties in contempt.



1 included both email and data from 280 different computers. (*Id.*) These extensive efforts  
2 uncovered no “downloaded material” at Uber. (*Id.*)

3 In addition, Uber undertook a massive review of privileged material for information  
4 covered by the Court’s Order. That was necessary because prior to Uber’s acquisition of Otto,  
5 the law firms representing the two parties retained the investigative firm Stroz to conduct an  
6 investigation in which Stroz would gather all information from five key employees of Otto to  
7 determine whether they might have in their possession materials from any of their prior  
8 employers. (*See* Order re: Uber Privilege Log, Dkt. No. 731 at 2.) This due diligence  
9 investigation generated a large volume of email communications between Stroz and the law  
10 firms, between the law firms and their clients, and between the lawyers representing the different  
11 parties. Uber and its counsel in this case took a conservative approach of reviewing all of those  
12 email communications to identify any that could be understood to have “forwarded, used, or  
13 ***referred to*** any part of said downloaded material” described in ¶ 4 of the March 16 Order. Since  
14 the Order required production of any document that “referred to any part of said downloaded  
15 material,” and since “said downloaded material” included “all files and documents downloaded  
16 by Anthony Levandowski, Sameer Kshirsagar, or Radu Raduta before leaving plaintiff’s payroll  
17 and thereafter taken by them,” the scope of this review was potentially very broad. If an email  
18 referred even generally or indirectly to a single document that Stroz may have gathered from  
19 Mr. Levandowski, or to media obtained from Mr. Levandowski that potentially contained any  
20 information from Google, then the email was to be deemed responsive. (Rivera Decl. ¶ 2.) Some  
21 documents that referred to the process for identifying such documents or media were also marked  
22 responsive. (*Id.*) It is important to emphasize that such an email was to be deemed responsive to  
23 ¶ 4 of the March 16 Order even if it did not actually disclose the contents of the material gathered  
24 from Mr. Levandowski, had nothing to do with any Google or Waymo trade secrets (or alleged  
25 trade secrets), and even if the file being “referred to” was not one of the 14,000 allegedly stolen  
26 files. (*Id.* ¶ 3.) Among the items listed on the privilege log were the Stroz Report itself and  
27  
28

certain of its exhibits,<sup>2</sup> which were included in the privilege log based on the above review criteria. (*Id.* ¶ 4.) Thus, this review of privileged material resulted in a very large number of documents that were listed on a privilege log that was delivered to Waymo in a timely fashion.

The destruction of the five discs that occurred in March 2016 is described in at least one of the documents listed on Uber's privilege log. (*Id.* ¶ 4.) In its efforts to comply with the March 16 Order, Uber did not recognize that it had the ability to provide a description of the destruction of the five discs that was based on non-privileged information.

**B. Uber Devoted Enormous Resources to Comply with the Court's May 11 PI Order.**

Uber devoted enormous resources to comply with the Court's May 11 provisional relief order. (Dkt. No. 426.) First, Uber sent a survey to each of its employees via its "Global Uber Team" email listserv and conducted interviews of over 160 employees, including any who responded that they had had communications with Anthony Levandowski in which he mentioned LiDAR. (Rivera Decl. ¶ 7.) Not one of the employees interviewed had seen or heard downloaded materials. (*Id.*) Second, Uber reviewed over 11,000 documents, including emails, Google Drive documents, and calendar invitations for any communications in which Mr. Levandowski mentioned LiDAR. None of these revealed downloaded materials. (*Id.* ¶ 8.) Third, Uber sent a survey to its LiDAR-related suppliers and followed up by phone and in writing with the suppliers who responded that they had had communications with Anthony Levandowski in which he mentioned LiDAR. None of these suppliers had seen or heard downloaded materials. (*Id.* ¶ 9.) Fourth, Uber interviewed 60 individuals at Stroz to document which of them may have seen potentially downloaded materials and to confirm none of them had sent downloaded materials to Uber. (*Id.* ¶ 10.) Finally, Uber conducted interviews of individuals known to have received the Stroz Report, including Uber board members and Uber's outside counsel, to verify

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<sup>2</sup> Uber initially did not list the name "Stroz" on the privilege log due to Mr. Levandowski's Fifth Amendment privilege claims. Once those claims had been rejected by the Federal Circuit, additional identifying information was provided.

1 the chain of custody and confirm none of them had forwarded any potentially downloaded  
2 materials to Uber. (*Id.* ¶ 11.)

3 In addition, Uber underwent 56 hours of inspection by Waymo, over the course of 10  
4 separate inspection days. (*Id.* ¶ 12.) The inspections included thousands of technical files, source  
5 code and emails. This also uncovered no downloaded materials at Uber.

6 **C. The Contract Between Mr. Levandowski and Stroz Makes Clear that**  
7 **Uber Does Not Have Access to or Control of Materials**  
8 **Mr. Levandowski Provided to Stroz.**

9 Mr. Levandowski's provision of materials to Stroz for the investigation was governed by a  
10 letter agreement between Mr. Levandowski and Stroz dated March 21, 2016 ("Levandowski-  
11 Stroz Agreement"). (Dkt. 545-8.) The Levandowski-Stroz Agreement prohibits Stroz from  
12 disclosing information provided by Mr. Levandowski except as permitted in an examination  
13 protocol.<sup>3</sup> The agreement allows for return or destruction of the materials provided by  
14 Mr. Levandowski to Stroz only *upon Mr. Levandowski's written request.* (*Id.*) The agreement  
15 does not allow Stroz to independently transfer any materials provided by Mr. Levandowski to a  
16 third party, even to Uber. (*Id.*) Due to these contractual limitations, Uber has no corporate,  
17 employment, contractual, or other authority to demand or compel Stroz to return any potentially  
18 downloaded materials in its possession to Waymo. Uber knew, based on Mr. Levandowski's  
19 assertion of his Fifth Amendment rights, that he would not consent to Stroz's transfer of any  
20 diligence materials to Waymo. Thus, any requests for Stroz to return these materials would have  
21 been futile.<sup>4</sup>

22 Following the May 31, 2017 deadline in the May 11 Order (Dkt. No. 426 ¶ 2 at 23), Uber  
23 met and conferred with Waymo about its compliance. (Corrected Ray Decl. ¶ 4; Schmidt Decl.  
24 Ex. 7, Dkt. No. 676-15.) Despite its lack of authority to demand or compel return of any

25 <sup>3</sup> An unredacted version of the agreement (and the protocol) was provided to the Court as  
26 Exhibit C to the June 28, 2017 letter from Uber to the Court and was produced today with the  
consent of Mr. Levandowski's counsel. (Ray Decl. ¶ 12; *Id.* Ex. A.)

27 <sup>4</sup> Notably, Uber *did* "exercise the full extent" of its authority, where it existed, to try to cause the  
28 return of downloaded material to Waymo. On May 26, 2017, Uber terminated Mr. Levandowski  
for, among other reasons, his refusal to return downloaded material to Waymo, including by  
failing to order Stroz to return any downloaded material that Stroz has. (Dkt. No. 519-2.)

1 downloaded materials, Uber responded to those meet-and-confer efforts on June 12, 2017 by  
 2 asking Stroz to return any downloaded materials it might have to Waymo and by simultaneously  
 3 telling Mr. Levandowski that he was required to direct Stroz to return any such materials to  
 4 Waymo. (Schmidt Decl. Ex. 4, Dkt. No. 676-10.) Neither Stroz nor Mr. Levandowski has  
 5 responded to Uber's June 12 requests. (Corrected Ray Decl. ¶¶ 10-11.)

6 **D. Waymo Has Known for Months that MoFo Has the Stroz Report and**  
 7 **Exhibits from MoFo's Representation of Uber During the Ottomotto**  
 8 **Acquisition.**

9 Waymo has known for months that MoFo provided legal advice to Uber pertaining to the  
 10 Otto acquisition. Uber's lengthy privilege log consists mainly of its communications with MoFo  
 11 during the acquisition. (Order re Uber's Privilege Log, Dkt. No. 731 at 2.) Waymo's counsel has  
 12 waved that log in court, proclaiming that he has never seen such a long log. Judge Corley has  
 13 held that the vast majority of the log entries are privileged communications. (Order, Dkt. No. 731  
 14 at 1.)

15 As discussed above, all parties to the Stroz investigation were bound by contractual  
 16 restrictions on distribution or transfer of any materials provided by Mr. Levandowski. MoFo  
 17 previously represented that it does not have any downloaded materials (or any copies, excerpts or  
 18 summaries thereof), except to the extent that any such material may appear: (1) excerpted in or as  
 19 an exhibit to the Stroz Report, which as explained above, is listed on the logs and is the subject of  
 20 on an ongoing privilege dispute; and (2) in certain materials Mr. Levandowski and other persons  
 21 provided to Stroz to which MoFo was given limited access during the investigation under the  
 22 terms of the Levandowski-Stroz Agreement and the investigation protocol—which included strict  
 23 prohibitions on sharing those materials with anyone, including Uber. (Corrected Ray Decl. ¶¶ 8-  
 24 9.) In an abundance of caution, MoFo could not previously rule out that it may still today have  
 25 documents in category (2) in its possession. (*Id.* ¶ 8.) After further investigation, including  
 26 checking with an attorney on maternity leave, Uber understands that MoFo initially determined  
 27 that it did not have any such materials in its possession. (*Id.*) However, Uber understands that  
 28 further investigation by MoFo has revealed that MoFo has some materials that Levandowski  
 provided to Stroz, and that Levandowski authorized Stroz to provide to MoFo in its previous role

1 as personal counsel for Levandowski, as explained in the July 12, 2017 Declaration of Eric Tate  
2 (Dkt. 883).

3 **E. Waymo Has Repeatedly Rejected Uber's Offers to Share Information**  
4 **About the Stroz Report.**

5 Uber advised Waymo, through counsel, on at least three occasions that it would provide  
6 information pertaining to the Stroz Report, on the condition that Waymo agree that such a  
7 disclosure would not amount to a subject-matter waiver. (González Decl. ¶ 2.) Waymo has  
8 categorically refused each time. (*Id.*)

9 First, before the parties' first meeting with the Special Master, Uber told Waymo that it  
10 wanted both sides to be able to engage in ex parte communications with the Special Master  
11 because Uber wanted his guidance on difficult privilege issues. (*Id.* ¶ 3.) Waymo declined. (*Id.*)  
12 Uber then said it wanted to disclose information about which it thought Waymo should be aware  
13 regarding the due diligence process without effecting a subject-matter waiver; Waymo's lead trial  
14 counsel, Charles Verhoeven, refused, saying that Uber could not use the privilege as a sword and  
15 a shield. (*Id.*)

16 Then, during the parties' first conference with Magistrate Judge Corley, Uber again  
17 offered to share information regarding the due diligence process (this time with either the Special  
18 Master or Judge Corley), but Waymo again refused to allow any ex parte communications and  
19 argued that voluntary statements about the due diligence process would be a waiver. (*Id.* ¶ 4.)

20 Finally, at a May 3, 2017 hearing, this Court asked a question about the content of the due  
21 diligence report. Uber's counsel, Arturo González, noted that he would answer the question as  
22 long as there was a stipulation that by answering, Uber was not waiving the privilege. (*Id.* ¶ 5; *Id.*  
23 Ex. A, May 3, 2017 H'rg. Tr. at 47:5-21.) Again, Waymo would not agree. (González Decl. ¶ 5.)

24 **F. Magistrate Judge Corley Has Rejected Waymo's Assertions that the**  
25 **Stroz Diligence Process Was Part of a Crime or Fraud.**

26 The Stroz investigation and report underlie much of Waymo's motion. Waymo has  
27 argued that the Stroz investigation was an illegitimate scheme. Judge Corley has rejected that  
28 argument, concluding: "[B]ased on the Court's review of the entire record in this case, including

1 the in camera Stroz Report, the Court found that Uber retained MoFo to conduct an investigation  
 2 into Levandowski and Otto and to create an evidentiary record that would govern Uber's  
 3 obligation to indemnify Levandowski and Otto in any lawsuit brought by Waymo." (Order on  
 4 Uber's Privilege Log, Dkt. 731 at 2.) Judge Corley further stated: "Waymo contends (1) Uber  
 5 was engaged in or planning the crime of receipt of Waymo's stolen property; and (2) that its  
 6 communications with MoFo were in furtherance of that scheme. It cites the evidence that  
 7 Levandowski took 14,000 of Waymo's files and that Uber knew that Levandowski took some  
 8 material as evidence that satisfies its burden. The Court is not persuaded." (*Id.*)

9 There is an ongoing privilege dispute about the Stroz investigation and report, which  
 10 Mr. Levandowski has appealed to the Federal Circuit. The order requiring production of those  
 11 materials has been stayed by the Federal Circuit pending appeal.

## 12 LEGAL STANDARD

13 A party may not be held in civil contempt for violating a court order unless the moving  
 14 party establishes that the party accused of contempt (1) "violated the court order, (2) beyond  
 15 substantial compliance, (3) not based on a good faith and reasonable interpretation of the order,  
 16 (4) by clear and convincing evidence." *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*,  
 17 10 F.3d 693, 695 (9th Cir. 1993). There can be no contempt when the order is "ambiguous" or  
 18 when there is "doubt or uncertainty in the minds of those to whom it is addressed." *Vertex*  
 19 *Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889, 891 (9th Cir. 1982).

20 A party may not be held in contempt if the party has substantially complied with the court  
 21 order: "[i]f a violating party has taken 'all reasonable steps' to comply with the court order,  
 22 technical or inadvertent violations of the order will not support a finding of civil contempt." *Gen.*  
 23 *Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986) (internal citation omitted);  
 24 *see Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006) (contempt  
 25 requires violation of "a specific and definite court order by failure to take all reasonable steps  
 26 within the party's power to comply"). Nor may a party be held in contempt if compliance with  
 27 the court order is impossible. *See, e.g., U.S. v. Ayres*, 166 F.3d 991, 994 (9th Cir. 1999) ("An  
 28 alleged contemnor may defend against a finding of contempt by demonstrating a present inability

1 to comply.” (citing *U.S. v. Rylander*, 460 U.S. 752, 757 (1983) (“Where compliance is  
2 impossible, neither the moving party nor the court has any reason to proceed with the civil  
3 contempt action.”))).

4 As this Court has recognized: “The purpose of civil contempt is to coerce compliance  
5 with the court’s order rather than punish disobedience.” *Perez v. i2a Techs., Inc.*, No. C 15-  
6 04963 WHA, 2015 WL 7753330, at \*4 (N.D. Cal. Dec. 2, 2015). Thus, if a party has fully  
7 complied before the contempt motion is filed, there is no basis for contempt. *Vertex*, 689 F.2d at  
8 892.

9 Contempt must “be clear and certain.” *Imageware, Inc. v. U.S. W. Commc’ns*, 219 F.3d  
10 793, 797 (8th Cir. 2000). “Any doubts” whether the requirements are “met in a particular case  
11 must be resolved in favor of the party accused of civil contempt.” *M Seven Sys. Ltd. v. Leap*  
12 *Wireless Int’l, Inc.*, No. 12cv01424 CAB (RBB), 2014 WL 3942200, at \*4 (S.D. Cal. Aug. 11,  
13 2014) (quoting 7 James Wm. Moore et al., *Moore’s Federal Practice* § 37.51[7][b], at 37-109  
14 (3d ed. 2013)). As this Court has explained, “[b]ecause of their very potency, inherent powers  
15 must be exercised with restraint and discretion.” *Cherry v. City College of S.F.*, No. C 04-04981  
16 WHA, 2007 WL 2904188, at \*3 (N.D. Cal. Oct. 1, 2007) (quoting *Chambers v. NASCO, Inc.*,  
17 501 U.S. 32, 44 (1991)).

## 18 ARGUMENT

### 19 I. THERE IS NO BASIS FOR CONTEMPT BASED ON UBER’S LACK OF 20 CONTROL OVER LEVANDOWSKI MATERIALS HELD BY STROZ AND 21 UBER’S EXTENSIVE GOOD FAITH EFFORTS TO COMPLY WITH THE 22 COURT’S ORDER.

#### 23 A. Uber Did Not Violate the Court’s Order Because It Has No Authority 24 to Compel Stroz to Produce Any Levandowski Material to Waymo.

25 The Court ordered Uber to “exercise the full extent” of its “corporate, employment,  
26 contractual, and other authority” to effect the return of downloaded materials to Waymo.  
27 (May 11 Order, Dkt. No. 426 at 23.) Uber did just that. Uber directed Mr. Levandowski—its  
28 employee at the time—to return or cause the return of any downloaded material to Waymo (or



1 certify its destruction), on pain of termination. (*See* Dkt. No. 466-2.) When Levandowski failed  
2 to comply, Uber terminated his employment. (*See* Dkt. No. 519-2.)

3 Waymo now seeks to hold Uber in contempt for failing to compel Stroz to provide  
4 Waymo with any downloaded materials it may have received from Mr. Levandowski. But Uber  
5 did not and does not have any authority, whether corporate, employment, contractual, or other, to  
6 compel Stroz to return or produce any such materials to Waymo. The Levandowski-Stroz  
7 Agreement prohibits Stroz from providing any such materials to Waymo (or anyone else) absent  
8 Mr. Levandowski's written consent. (*See* AL-Stroz Agreement, Dkt. No. 545-8 (providing only  
9 that "Stroz will promptly return or destroy" documents and files on Mr. Levandowski's written  
10 request).) Uber also had no independent contractual agreement with Stroz, or any other authority  
11 over Stroz, that would have overridden the Levandowski-Stroz agreement. A party may not be  
12 subject to contempt for actions beyond its power and control. *See Ayres*, 166 F.3d at 994 ("a  
13 present inability to comply" is a defense to contempt).

14 Despite these clear limits of its authority, Uber made a firm and clear written request to  
15 Stroz and to Mr. Levandowski to return to Waymo any downloaded materials that Stroz may  
16 have. (Schmidt Decl. Ex. 4, Dkt. No. 676-10.) Levandowski apparently refused to give Stroz  
17 permission, and Stroz has not produced the materials. There is nothing more that Uber can  
18 legally do to compel Stroz to return the materials.

19 Waymo seeks to hold Uber in contempt for matters that are **beyond** Uber's authority—  
20 which is not what this Court's Order required. Waymo argues that Uber should have  
21 "threaten[ed] to cut off business ties with Stroz should Stroz refuse to [return the materials.]"  
22 (Mtn., Dkt. No. 676-4 at 12.) In Waymo's own words, Uber should have tried "to pressure  
23 Stroz." (*Id.*) But such "pressure" tactics would have been fruitless, as they could not change the  
24 valid contract between Stroz and Mr. Levandowski preventing Stroz from producing the  
25 documents without Mr. Levandowski's written consent. Moreover, if Uber had threatened Stroz  
26 with cutting off all future business, and that had led Stroz to breach its agreement with  
27 Mr. Levandowski, that would have exposed Uber to tort liability for intentional inducement of  
28 breach of contract. *See PG&E v. Bear Stearns & Co.*, 50 Cal. 3d 1118 (1990). Uber was not



1 obligated to act outside its authority or unlawfully, particularly given that the Order did not  
 2 unambiguously require such actions, *see Reno Air Racing Ass’n*, 452 F.3d at 1130 (requiring a  
 3 violation of a “specific and definite” requirement of a court order for contempt).

4 **B. Uber Substantially Complied with the Court’s Orders, Acted in Good**  
 5 **Faith, and Waymo Has Suffered No Injury.**

6 Even if the Court believes that Uber should have done something more to “pressure” Stroz  
 7 to produce documents, it should still recognize that, at an absolute minimum, Uber “substantially  
 8 complied” with the Court’s existing Orders and therefore cannot be held in contempt. *In re Dual-*  
 9 *Deck*, 10 F.3d at 695-96. As shown in Fact Sections A & B, above, Uber expended enormous  
 10 resources complying with both the March 16 and May 11 Orders. Those efforts constitute  
 11 substantial compliance with the Court’s Orders, because Uber has taken “‘all reasonable steps’ to  
 12 comply.” *Gen. Signal Corp.*, 787 F.2d at 1379.

13 Moreover, the Court’s Orders contain no “specific and definite” requirement that Uber use  
 14 “pressure” tactics against Stroz that would expose Uber to various other legal liabilities. Absent a  
 15 violation of an unambiguous order, there can be no contempt. *In re Dual-Deck*, 10 F.3d at 695.  
 16 Uber’s understanding that the Court’s Orders did not require it to somehow try to force Stroz to  
 17 breach its contract with Mr. Levandowski was also a good-faith understanding of the Order—  
 18 providing yet another reason why contempt is inappropriate. *Id.*

19 Waymo also has suffered no discovery prejudice. Even if Uber had sent the June 12 letter  
 20 earlier, or had used more “pressure” tactics as Waymo insists it should have, Waymo would not  
 21 have received the materials from Stroz. Mr. Levandowski continues to refuse to give Stroz  
 22 permission to turn over his materials, and he has appealed the Court’s orders compelling Uber  
 23 and Stroz to produce the Stroz Report and exhibits (which orders are stayed pending appeal). A  
 24 contempt finding against Uber would not only be legally and factually unfounded, but it would  
 25 not change Uber’s lack of authority to compel Stroz to produce Mr. Levandowski’s materials.

1           **II.       THERE IS NO BASIS FOR CONTEMPT BASED ON MOFO'S**  
 2           **POSSESSION OF THE STROZ REPORT AND MATERIALS.**

3           Waymo also seeks contempt because Uber has not caused MoFo to return two categories  
 4 of material that may fall within the broad definition of “downloaded materials” in the Court’s  
 5 Orders: (1) materials excerpted in the Stroz Report or attached as an exhibit to that report; and  
 6 (2) materials Mr. Levandowski and other persons provided to Stroz to which MoFo was given  
 7 limited access *during the Stroz investigation* under the terms of the Levandowski-Stroz  
 8 Agreement—which included strict prohibitions on sharing those materials with anyone, including  
 9 Uber.<sup>5</sup>

10           As to the first category, those materials were all listed on the privilege logs provided to  
 11 Waymo in a timely fashion. Those logs and the underlying materials are part of the privilege  
 12 disputes in this matter that are currently on appeal to the Federal Circuit, which has stayed the  
 13 orders requiring production pending appeal. In these circumstances, there can be no issue of  
 14 contempt because Uber and MoFo complied with the Court’s Orders: the privilege was timely  
 15 asserted, the logs containing material responsive to the Court’s Order were provided, and the  
 16 production of the privileged material has been stayed pending the Federal Circuit’s appeal. Until  
 17 that stay is lifted and the privilege issues resolved on appeal, Uber and MoFo can do no more  
 18 with respect to category (1).<sup>6</sup>

19           As to the second category (“materials Mr. Levandowski and other persons provided to  
 20 Stroz to which MoFo was given limited access *during the Stroz investigation* under the terms of  
 21 the Levandowski-Stroz Agreement”), MoFo has confirmed that it does not have any such

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22           <sup>5</sup> Waymo misrepresents the meet-and-confer process following the Court’s May 31, 2017  
 23 deadline. (Mtn., Dkt. No. 676-4 at 7.) During that conference, Uber’s counsel made *no*  
 24 representations about whether MoFo had any “copies, excerpts, or summaries of the downloaded  
 25 materials” in its possession in view of the privilege concerns with respect to the Stroz  
 26 investigation. (Ray Decl. ¶ 7.) Waymo suggests that MoFo attempted to misrepresent this fact,  
 27 even though Uber had already served a privilege log disclosing MoFo as one of the recipients of  
 28 the Stroz Report. (Rivera Decl. ¶ 6; *Id.* Ex. A.)

26           <sup>6</sup> Uber has repeatedly sought a stipulation from Waymo that no waiver will result from disclosure  
 27 of any parts of the Stroz investigation or report. (*See* Background Section E, *supra*; González  
 28 Decl. ¶¶ 2-4.) Waymo has refused. In light of those rebuffs, Uber has reasonably concluded that  
 there is a significant risk of waiver if MoFo turns over the Stroz report or exhibits prior to a final  
 appellate decision on the privilege issue.

1 materials in its possession or control other than as included as exhibits to the Stroz Report, which  
 2 already is covered by the first category. In response to Waymo's motion, MoFo conducted  
 3 further investigation, including checking with an attorney on maternity leave, to reach this  
 4 confirmation. However, Uber learned yesterday that further investigation by MoFo also revealed  
 5 that MoFo has some materials that Levandowski provided to Stroz, and that Levandowski  
 6 authorized Stroz to provide to MoFo *in its former role as personal counsel for Levandowski*  
 7 *since the inception of the arbitrations brought by Google* (and not from the Stroz diligence  
 8 investigation or anything else preceding this litigation). This is explained in the July 12, 2017  
 9 Declaration of Eric Tate. (Dkt. 883). Uber has never had possession, custody, or control over  
 10 these materials. Especially because Uber did not know MoFo even had these materials until  
 11 yesterday, Uber cannot be held in contempt for not producing materials it does not possess or  
 12 control.

13 Contempt cannot be based on actions that are beyond a party's authority or control. *See*  
 14 *Ayres*, 166 F.3d at 994. Because Uber has taken "all reasonable steps" to comply with respect  
 15 to the materials at MoFo, *Gen. Signal Corp.*, 787 F.2d at 1379, and because Uber's actions were  
 16 and are "based on a good faith and reasonable interpretation of the [C]ourt's order," *Reno Air*,  
 17 452 F.3d at 1130, there cannot be a finding of civil contempt.

### 18 **III. THERE IS NO BASIS FOR CONTEMPT BASED ON UBER'S RESPONSE** 19 **TO WAYMO'S EXPEDITED INTERROGATORY NO. 1.**

20 Contempt is not warranted based on Uber's June 5, 2017 disclosure of the destruction of  
 21 the five discs. Waymo argues that Uber should be held in contempt for failing to disclose that  
 22 fact sooner, but that is not a basis for contempt. First, Uber substantially complied with the  
 23 Court's March 16 Order based on an enormous, good-faith undertaking, which precludes a  
 24 finding of contempt. Second, Uber provided the information about the five discs once it  
 25 determined it could do so in a non-privileged manner, and before contempt was sought. Uber's  
 26 substantial compliance and reasonable steps to comply with the Court's Orders in good faith are  
 27 sufficient to preclude a finding of contempt. Additionally, the Court should consider Uber's lack  
 28 of willfulness in late-disclosing the fact (helpful to Uber) about the destruction of the discs, as

1 well as Waymo's lack of injury by the belated disclosure, both of which weigh against a finding  
2 of contempt.

3 **A. Uber Substantially Complied with the Court's Order.**

4 In response to the Court's March 16, 2017 Order, Uber conducted a massive investigation  
5 to confirm that it did not have any downloaded materials. In two weeks of intensive efforts with  
6 its outside counsel and forensic experts, Uber searched 9 servers and 148 custodian computers  
7 and emails, totaling 235 terabytes of data. This extensive search turned up no sign of the  
8 downloaded materials. In addition, Uber's counsel reviewed thousands of pages of emails to  
9 identify anything that could potentially be read to "refer" to something within the meaning of  
10 "downloaded material," and then assembled a very substantial privilege log.

11 All of the foregoing work was done to ensure compliance with paragraph 4 of the  
12 March 16 Order. These efforts on their own constitute "substantial compliance" with that  
13 provision of the Order, and therefore preclude a finding of contempt. *See Gen. Signal Corp.*,  
14 787 F.2d at 1379 (contempt may not be imposed where a "party has taken 'all reasonable steps' to  
15 comply with the court order," and any violations are "technical or inadvertent").

16 In addition, and as further evidence of its substantial compliance, Uber has provided the  
17 very information at issue: a non-privileged description of what it knows about the destruction of  
18 the five discs. On June 5, 2017, in its response to expedited Interrogatory No. 1, Uber provided a  
19 description of Mr. Levandowski's March 11, 2016 meeting with three Uber executives, where he  
20 identified the five discs. (Schmidt Decl. Ex. 1, Dkt. No. 694.) Uber's response explains the  
21 conversations that followed and explains that Mr. Levandowski communicated that the discs had  
22 been destroyed. (*Id.*) Contempt is unwarranted due to Uber's substantial compliance and  
23 because it "introduced evidence that [its] violation had been discovered and steps taken to correct  
24 it" before the contempt motion was filed. *Vertex*, 689 F.2d at 892.<sup>7</sup>

25  
26 <sup>7</sup> *See also U.S. v. Geary*, C.V. No. 05-00135 DAE-BMK, 2007 U.S. Dist. LEXIS 31604, at \*10-  
27 13 (D. Haw. Apr. 30, 2007) (upholding decision by Magistrate not to impose sanctions where  
28 respondents were not in compliance with Order when contempt filed but subsequently complied);  
*Aspen Grove Owners Ass'n v. Park Promenade Apts., LLC*, No. C09-1110-JCC, 2010 WL  
3431155, at \*3-4 (D. Wash. Aug. 13, 2010) (no contempt for delayed compliance); *Scruggs v.*

1 Even if the Court concludes that this description of the destruction of the five discs should  
2 have been provided earlier, it should nonetheless conclude that Uber has substantially complied  
3 with paragraph 4 of the Court's Order. Uber has searched high and low for the files. Uber has  
4 produced a privilege log identifying the emails referencing any possible downloaded material.  
5 Uber has provided a description of what Mr. Levandowski told Uber about the five discs and their  
6 subsequent destruction. Uber is not aware of anything more it can do to comply with paragraph 4  
7 of the March 16 Order, and no purpose would be served by imposing contempt.

8 **B. There Are Good Faith Reasons the Description of the Five Discs Was**  
9 **Not Provided Until June 5.**

10 While recognizing that "good faith" in the abstract is not a defense to a charge of  
11 contempt, Uber submits that the following context is relevant to assessing Uber's substantial  
12 compliance and how to dispose of this motion.

13 First, Uber did not deliberately seek to hide the information about the destruction of the  
14 discs. That information is helpful to Uber in confirming that it never wanted any Google  
15 information, and never received any.

16 Second, the description of the five discs and their destruction is contained in at least one  
17 of the documents on the privilege log timely submitted in response to the March 16 Order. Thus,  
18 the information about the five discs was not withheld, but rather initially was part of the  
19 information that Uber believed to be privileged. After this Court issued an Order requiring Uber  
20 to state whether it was waiving any privileges by June 1, Uber closely analyzed the difficult  
21 privilege issues raised in this case, and concluded that its privileged documents contained  
22 descriptions of non-privileged facts that could be proven with non-privileged evidence. The  
23 discussions between Mr. Levandowski and the three non-lawyer Uber executives about the five  
24 discs and their destruction was one such fact, and was therefore included in the interrogatory  
25 response on June 5.

26  
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28 

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*Vance*, No. 2:06-cv-0633 KJM KJNP, 2012 WL 423486, at \*3 (E.D. Cal. Feb. 8, 2012) (no  
contempt where documents produced after the hearing on contempt).

1 Third, there is a limit to what Uber knows. Uber has never seen the five discs that  
2 Mr. Levandowski said he found, let alone their contents. Uber cannot certify that these discs  
3 contained some or all of the 14,000 allegedly stolen files, and cannot even be 100% certain that  
4 the discs existed. What Uber knows about the discs comes from Mr. Levandowski, prior to his  
5 invocation of the Fifth Amendment.

6 **C. Waymo Was Not Injured as a Result of the June 5 Disclosure.**

7 Waymo has suffered no injury or prejudice as a result of Uber's June 5 response to  
8 expedited Interrogatory No. 1. All relevant depositions took place after that response was served;  
9 indeed, Waymo has questioned Lior Ron, Cameron Poetzsch, and Nina Qi about the five discs  
10 and the March 11 meeting in their depositions. (Mtn., Dkt. No. 676-4 at 6; Corrected Ray Decl.  
11 ¶ 12.) Thus, neither a contempt finding nor sanctions would be appropriate here, where Uber  
12 substantially complied and there was no injury. *See Gen. Signal Corp.*, 787 F.2d at 1380 (civil  
13 contempt sanctions may be coercive or compensatory but not punitive).

14 \*\*\*

15 In light of the filing of this corrected opposition on the same day that Waymo's reply brief  
16 is due, Uber does not oppose the Court granting Waymo additional time to file its reply brief or  
17 allowing an additional filing by Waymo responding to the corrected matters contained herein.

18 **CONCLUSION**

19 Waymo has failed to establish by clear and convincing evidence that Uber is in civil  
20 contempt of the Court's March 16, 2017 or May 11, 2017 Orders. Uber respectfully requests that  
21 the Court deny Waymo's motion.

1 Dated: July 12, 2017

MORRISON & FOERSTER LLP

2  
3 By: /s/ Arturo J. González  
ARTURO J. GONZÁLEZ

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